2011 WL 11056971 (Ky.App.) (Appellate Brief)
Court of Appeals of Kentucky.

Geneva KING, Appellant,
v.
BUTLER REST HOME, INC. d/b/a River Valley Nursing Home,
and
COMMONWEALTH OF KENTUCKY, Kentucky Cabinet for Health and Family Serivces, Appellee.

No. 2010-CA-001467-MR.
January 18, 2011.

Appeal from Franklin Circuit Court
Division II Action No. 10-CI-000193
Hon. Thomas Wingate, Judge

Brief for Appellant

Hon. Robert L. McClelland.

Hon. Mark Maddox, Attorneys of Appellant, Geneva King, McClelland & Associates, PLLC, P.O. Box 54654, Lexington, KY 40555, 859-543-0061.

***5** STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT #1

THE FRANKLIN CIRCUIT COURT AND THE CABINET BOTH ALLOW BUTLER REST HOME, INC. TO VIOLATE 42 CFR § 483.12(a)(4)(i) WHICH REQUIRES A "NOTICE OF DISCHARGE" BE SERVED ON THE "RESIDENT" AND THAT 900 KAR 2:050 § 1 (3) IS UNCONSTITUTIONAL.TAUBAUTHORITIES

***6** ARGUMENT #2

THE FRANKLIN CIRCUIT COURT AND THE CABINET BOTH ALLOW BUTLER REST HOME, INC. TO VIOLATE 900 KAR 2:050 §2(1)(e) and 42 CFR § 483.12(a)(2)(v) IN THAT A NURSING HOME IS PROHIBITED FROM TRANSFERRING OR DISCHARGING A RESIDENT FOR NON-PAYMENT IF HE OR SHE HAS SUBMITTED TO A THIRD PARTY PAYOR ALL PAPERWORK NECESSARY FOR THE BILL TO BE PAID, INCLUDING THE FINAL MEDICAID AGENCY DENIAL OF BENFITS.TAUBAUTHORITIES

***7** ARGUMENT #3

*THE FRANKLIN CIRCUIT COURT AND THE CABINET BOTH ALLOW BUTLER REST HOME, INC. TO NAME THE LOCATION OF DISCHARGE IN THE NOTICE OF DISCHARGE WTIHOUT PROVIDING PROPER PREPARATION AND ORIENTATION IN VIOLATION OF 900 KAR 2:050 §2(6) AND 42 CFR § 483.12(a)(7).*TAUBAUTHORITIES

***3 INTRODUCTION**

This is an appeal from the Franklin Circuit Court Order entered July 19, 2010 and August 03, 2010 sustaining the Final Order of a hearing officer for the Cabinet For Health and Family Services finding that a nursing home discharge met the standard required under 42 CFR § 482.12 to discharge the resident.

***4 STATEMENT CONCERNING ORAL ARGUMENT**

The Appellee requests that this Appeal be accorded oral argument. The issues relating to the facts and the applicable laws relate broadly to the application of Federal law, and Kentucky Administrative Regulations protecting nursing home residents from unwarranted discharge while awaiting Medicaid approval when an initial caseworker denies Medicaid and an administrative appeal is pending. This is a case of first impression.

***8 STATEMENT OF THE CASE**

The Appellee, Butler Rest Homes, Inc. operates a skilled nursing facility doing business as River Valley Nursing Home, hereinafter "River Valley". The facility is a 60-bed licensed facility for skilled care and is both Medicare and Medicaid certified. The Appellant, Geneva King, is a resident of River Valley who was admitted to the facility on or about March 19, 2008. (Record on Appeal, hereinafter RA page 57 paragraph #1 and #2 of Findings of Fact of Kris M. Carlton, Administrative Law Judge, hereinafter FFKC) Diana Livengood holds a Durable Special Power of Attorney for Health Care, as well as a **Financial** Power of Attorney, on behalf of Geneva King. (RA page 58 #2 FFKC).

The payor source for Geneva King's account with River Valley changed on June 1, 2009 from private pay to Medicaid, pending Medicaid confirmation. (RA page 59 #5 FFKC). River Valley received a letter of denial from Medicaid that King's application had been denied November 18, 2009. (RA page 59 #6 FFKC). A bill for services was sent by River Valley for $41,683.55 on January 1, 2010, but River Valley did not receive payment. (RA page 60 #6 FFKC).

Melanie Hyden a caseworker in the office of the Department for Community Based Services who denied Geneva King's application agreed that a request for Fair Hearing had been made on behalf of Geneva King to appeal the Medicaid denial. (RA page 61 & 62 #12 FFKC). Jon Klein is an attorney employed by the Cabinet for Health and Family Services, Office of Legal Services. He testified in regard to Geneva King's eligibility, the Medicaid denial is not considered "final" until the appeal process is complete. ***9** Further, that Geneva King has a hearing in the matter of her denial scheduled for February 12, 2010. (RA page 62 #15 FFKC).

Kenneth Urlage is the administrator for River Valley Nursing Home. Mr. Urlage wrote a letter giving notice of discharge which he mailed on January 4, 2010, via First-Class U.S. Mail. (RA page 60 #8 & # 9 FFKC). The letter was addressed to Mrs. Geneva King [c/o] Diana Livengood, 1010 Sycamore Street, Falmouth, Kentucky 41040. The letter states that "Mrs. King will be discharged to 1010 Sycamore Street on February 4th, 2010 to your care." The letter states that copies were forwarded to Pam Pangburn, OMBUDSMAN, McClelland & Associates, PLLC, and Arnold Taylor, Attorney (RA page 46). McClelland & Associates, PLLC is the law firm representing the Appellant and Arnold Taylor, is the attorney representing the Appellee, Butler Rest Home. The Memorandum of Butler Rest Home, Inc. sets forth that Mr. Urlage stated that no one from River Valley went to King and told her that she was to be discharged, and that the letter was not handed to King herself. (RA 112). Mr. Urlage testified that nobody at River Valley would have told this ill woman that she was being discharged. (RA 114).

The discharge was appealed by Geneva King and an administrative hearing was conducted on January 28, 2010. (RA page 56). Although the discharge letter of January 4, 2010 states a location to which Geneva King is to be discharged no visit to the proposed location had been made by River Valley as of the date of the hearing. (RA 65 #8 Conclusions of Law of Kris M. Carlton, Administrative Law Judge, hereinafter CLKC).

***10** On the 3rd day of February, 2010 Kris M. Carlton, Administrative Law Judge entered her Findings of Fact, Conclusions of Law, and rendered her Final Order (Appendix 3) that concluded that Butler Rest Home, Inc., d/b/a River Valley Nursing Home was in compliance with the requirements of 900 KAR 2:050 in its transfer or discharge of Geneva King and ORDERED that Geneva King may be discharged from the facility effective February 4, 2010. (RA pages 65, 66 & 67). It is from this decision that the Appellant filed an appeal to the Franklin Circuit Court on February 4, 2010. (RA page 01).

The Franklin Circuit Court rendered its decision on the 19th day of July, 2010. (RA page 217) (Appendix 2.) The Court set forth Geneva King's three contentions: (1) That the Final Order was arbitrary and capricious, and an **abuse** of discretion, because the Cabinet found that River Valley properly gave notice of the involuntary discharge to the Resident, Mrs. King, in accordance with 900 KAR 2:050 §2(4)(a) [sic, 900 KAR 2:050§2(3)(a)]; (RA page 224) (2); That the Final Order of the Cabinet violated her constitutional and statutory provisional rights, because the fact that Petitioner had submitted all the paperwork necessary for Medicaid to pay her bill prohibited River Valley from discharging Petitioner for nonpayment;(RA pages 220-221); and (3) That the Cabinet erroneously upheld River Valley's notice of discharge, because River Valley did not provide proper preparation and orientation to the resident before naming the location of discharge in the letter of notice.(RA pages 224-225).

The Court found that as a matter of law the failure to deliver a notice of discharge to ***11** Geneva King was not a violation of 900 KAR 2:050 § 2(4)(a) [sic, 900 KAR 2:050§2(3(a)]. (RA page 224). However, while the Administrative Law Judge made this finding on the basis of "the powers of attorney of Livengood, coupled with the contract" (RA page 17 #5 CLKC) [even though the contract was not signed, (RA page 45).] The Circuit Court made its decision on a separate basis of the definition of "Resident" as set forth under 900 KAR 2:050 § 1(3). (RA page 224). The Court further found that as a matter of law that a facility need not house a resident without payment while a Medicaid denial is being appealed. (RA page 224). Finally, the Court found that as a matter of law there is no requirement that 900 KAR 2:050 § 2(6) [dealing with preparation for discharge] has to be complied with prior to writing the address to which a resident is to be discharged in the notice of discharge letter. (RA pages 224- 225).

The first time in any of the proceeding that the definition of "Resident" under 900 KAR 2:050 § 1(3) was ever put forward was in the decision of the Circuit Court on page 8 of its opinion. (RA page 224). As this issue had never been briefed by any

party the Appellant filed a Motion to Alter, Vacate or Amend on the 21st day of July, 2010. (RA page 227). The Appellant set forth the position that 900 KAR 2:050 § 1(3) eliminates the right granted to a "resident" of a facility by 42 CFR § 483.12(a)(4)(i) to receive the notice of discharge. (RA pages 227-228). The Circuit Court by its Order entered August 3, 2010 denied the motion. (RA page 254) (Appendix 1). It is from these decisions of the Circuit Court entered July 19, 2010 and August 3, 2010 that this appeal arises.

***12 ARGUMENT #1**

THE FRANKLIN CIRCUIT COURT AND THE CABINET BOTH ALLOW BUTLER REST HOME, INC. TO VIOLATE 42 CFR § 483.12(A)(4)(I) WHICH REQUIRES A "NOTICE OF DISCHARGE" BE SERVED ON THE "RESIDENT" AND THAT 900 KAR 2:050 § 1 (3) IS UNCONSTITUTIONAL.

The above issue was preserved for appeal by the filing a Memorandum on April 9, 2010, see Argument Two (RA page 138) and a Motion to Alter, Vacate or Amend on July 21, 2010 (RA 227)

42 CFR § 483.12(a)(4)(i) Notice before transfer. Before a facility transfers or discharges a resident, the facility must-

> (i) Notify the resident **and,** [emphasis added] if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. (Appendix 4)

900 KAR 2:050 § 2(3)(a) Notice before transfer. Before a facility transfers or discharges a resident, the facility shall:

> (a) Notify the resident ***and,*** [emphasis added] if known, a family member or legal representative of the resident, in writing, of the transfer or discharge and the reasons for the relocation in a language and manner they understand; (Appendix 5)

The Administrative Law Judge (ALJ) in her opinion found that while a separate written discharge notice was not issued to Geneva King, that a notice mailed to Livengood who had a power of attorney for Geneva King, coupled with a contract constituted sufficient notice under the requirements of 907 (sic.) [900] KAR 2:050 (RA page 17 # 9 CLKC). The Appellant in her brief to the Circuit Court pointed out that the contract upon which the ALJ relied was not signed by Diana Livengood on behalf of Geneva King as the signature line (Appendix 6) is blank. (RA pages 45 and 138). The Franklin Circuit Court in the footnote of its opinion found that this decision by the ALJ to be harmless error because 900 KAR 2:50 §1 (3) defines "resident" to include the legal ***13** representative. Thus, the court determined that Geneva King was properly served with the Notice of Discharge by the mailing of the discharge letter to her agent under a power of attorney. (RA, page 224)

The Court in compounding the ALJ's error, however, did correctly find that "Kentucky is also subject to the Medicaid Act, found at 42 U.S.C. §§ 1396 et seq. of the Social Security Act." (Appendix 2) (RA page 221). Had the Court applied this finding to the facts of this case it should have determined that the decision of the ALJ was not harmless error because 900 KAR 2:050 §1(3) violates 42 CFR §483.12(a)(4)(i) and dramatically changes the rule that notice must be given to the resident herself. (See, Footnote 1 at RA 224.)

42 CFR § 483.12 does *not* define the word "resident" to include a legal representative or individual acting on behalf of the resident.

Additionally, the FNHRA [Federal Nursing Home Reform Act] use the word 'residents' throughout. Thus, its provisions are clearly 'phrased in terms of the persons benefitted.' See Gonzaga Univ., 536 U.S. at 284, 122 S.Ct. 2268 (quoting Cannon, 441 U.S. at 692 n. 13, 99 S.Ct. 1946). Moreover, no provision uses the word 'resident' simply in passing. Instead, the FNHRA are constructed in such a way as to stress that these 'residents' have explicitly identified rights, such as 'the right to be free from

physical or mental **abuse**, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for the purposes of discipline or convenience and not required to treat the resident's medical symptoms.' 42 U.S.C. § 1396r(c)(1)(A) (emphasis added). These statutory provisions are, in other words, 'concerned with whether the needs of any particular person have been satisfied,' not solely with an aggregate institutional policy and practice.

Grammer v. John J. Kane Regional Centers-Glen Hazel, 570 F.3d 520, 529-530 (3rd Cir, 2009) (Appendix 7).

***14** 42 CFR § 483.12(a)(4)(i) and 900 KAR 2:050 § 2 (3)(a) relating to Nursing Home Notice of Discharge, differentiate between the word "resident" and "legal representative" or "individual acting on behalf of the resident." [1] Those regulation states that written notice must be given to "the resident and, if known, a family member or legal representative of the resident...." [2] [emphasis added]. Use of the expanded definition of "resident" under 900 KAR 2:050 §1 (3) would permit the evasion of the responsibility of a facility to serve the actual "resident" as required by 42 CFR § 483.12(a)(4)(i) to receive the notice of discharge. [3]

"Having elected to participate in the Medicaid program, defendant may not, by regulation, frustrate the plain language of the statutory and regulatory scheme. To permit evasion of the requirements of the Act [Medicaid Act] would allow the state agency to rewrite Congressionally mandated standards and render the Medicaid program totally meaningless."

Fant v Stumbo, 552 F. Supp. 617, 619 (W.D.KY 1982) (Appendix 10).

If 900 KAR 2:050 § 1(3) is not ruled unconstitutional, then the door is open a little wider in Kentucky for further **abuse** of its **elderly** citizens. An example would be an ***15** "individual acting on behalf of the resident" [4] who handles the **finances** of a nursing home resident and does not pay the nursing home. Under 900 KAR 2:050 §1 (3) that person could receive service of the notice of discharge and the nursing home resident not even know that the bill had not been paid until the nursing home is rolling her out the door.

***16 ARGUMENT #2**

THE FRANKLIN CIRCUIT COURT AND THE CABINET BOTH ALLOW BUTLER REST HOME, INC. TO VIOLATE 900 KAR 2050 §2(1)(E) AND 42 CFR § 483.12(A)(2)(V) IN THAT A NURSING HOME IS PROHIBITED FROM TRANSFERRING OR DISCHARGING A RESIDENT FOR NON-PAYMENT IF HE OR SHE HAS SUBMITTED TO A THIRD PARTY PAYOR ALL PAPERWORK NECESSARY FOR THE BILL TO BE PAID, INCLUDING THE FINAL MEDICAID AGENCY DENIAL OF BENFITS.

The above issue was preserved for appeal by the filing a Memorandum on April 9, 2010, see Argument One. (RA page 133).

"Even when a resident has failed to make payment, [Medicaid] contractors must continue to provide care pending an opportunity for administrative review regarding funding. See 42 U.S.C. Sec. 1396r(c)(2)(A)-(C)." *Linton by Arnold v Commissioner of Health and Environment. State of Tenn.* 65 F.3d 508, 515 (C.A.6 (Tenn.), 1995). (Appendix 11).
"Title XIX of the Social Security Act, codified at 42 U.S.C. §§ 1396 - 1396v is popularly known as the 'Medicaid Act'. This Act established a 'cooperative Federal-state program under which the federal government furnishes funding to states for the purpose of providing medical assistance to eligible low-income persons'.

States are, of course, not required to participate in this program, but those who do accept federal funding must comply with the Medicaid Act and with regulations promulgated by the Secretary of Health and Human Services.

After the "Medicaid Act" passed, Congress became
***17** deeply troubled that the Federal Government, through the Medicaid program, continue[d] to pay nursing facilities for providing poor quality care to vulnerable **elderly** and disabled beneficiaries.

In 1987, Congress passed the FNHRA [Federal Nursing Home Reform Amendments], contained in OBRA [Omnibus Budget Reconciliation Act], to provide for the oversight and inspection of nursing homes that participate in Medicare and Medicaid programs.

Grammer v Kane Regional Centers, 570 F.3d 520,523 (3rd Cir.,2009) Cert denied Feb 22, 201009-696.

> The Social Security Act (the Act) mandates the establishment of *minimum* [emphasis added] health and safety and CLIA standards that must be met by providers and suppliers participating in the Medicare and Medicaid programs. The Secretary of the Department of Health and Human Services (DHHS) has designated CMS [Centers for Medicare & Medicaid Services] to administer the standards compliance aspects of these programs.

Federal Centers for Medicare and Medicaid, *State Operations Manual* Rev. 1, 05-21-04 Chapter 1 at "Background" § 1000 [5] (Appendix 12)

CMS has written the State Operations Manual Appendix PP - Guidance to Surveyors for Long Term Care Facilities to which the State of Kentucky subscribes for their Medicaid program. These guidelines "interpret" the Federal statutes and regulations for the state agency. Each Long Term Care Facility in the State of Kentucky that contracts with Medicaid must meet or exceed the "minimum" standards in the State Operations Manual to conform to the Federal law. Id. at § 1000, §1000B, § 1002, §1004, §1006, §1008B.

900 KAR 2:050, et seq are the Kentucky Administrative Regulations that set forth ***18** the requirements relating to residents' transfer and discharge rights. These regulations mimic 42 CFR 483.12, except as to 900 KAR 2:050 §1(3) which unconstitutionally expands the definition of "Resident." 900 KAR 2:050§ 2(1)(e) and 42 CFR § 483.12(a)(2)(v) are the regulations that set forth the right of the facility to discharge a resident for non-payment. When reviewing these requirements one must look to the State Operations Manual Appendix PP - Guidance to Surveyors for Long Term Care Facilities for guidance. [6]

On January 4, 2010 River Valley sent Mrs. King a discharge letter (RA, p 46) that stated "The reason for discharge is lack of payment since June 1, 2010". (Appendix 14). 900 KAR 2:050 §2 (1) (e) (Appendix 5) [and 42 CFR §483.12(a)(2)(v)] (Appendix 4) states that: The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless: (e) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid or state supplementation) a stay at the facility.

In this appeal the discharge hearing officer and the Circuit Court ruled that it was not necessary for the Nursing Home to delay their discharge of a Medicaid applicant until a "Final Order" of a Medicaid application administrative appeal was issued, but could discharge the applicant based on the caseworker's denial. (RA, pages 18 #9 CLKC, 224). However, the federal law states that more than a caseworker's denial is required before a discharge is valid.

> ***19** A resident cannot be transferred for non-payment if he or she has submitted to a third party payor all the paperwork necessary for the bill to be paid. Non-payment would occur if a third party payor, including Medicare or Medicaid, denies the claim and the resident refused to pay for his or her stay.

CMS State Operations Manual Appendix PP, Supra at F201 interpreting 42 CFR 483.12(a)(2)(v).

In 2008, Geneva King applied for Medicaid and was denied for transferring resources. A period of ineligibility was assigned and Geneva King paid River Valley through the penalty period with private funds. Thereafter, Mrs. King submitted to Medicaid (a third party payor) a second application for Medicaid benefits on June 1, 2009. (RA page 217) This application included all the paperwork necessary for the bill to be paid. On November 18, 2009 the Medicaid *caseworker* denied Mrs. King (RA page 12 #6 FFKC) not for transferring resources, but for "excess resources". (RA page 15 #12 FFKC). On December 1, 2009 Mrs. King filed a timely Notice of Appeal of that decision. The filing of this Notice of Appeal was again all the paperwork necessary for the bill to be paid if the administrative appeal is in favor of the applicant.

At the time of the administrative hearing on her appeal of her discharge from River Valley conducted on January 28, 2010, (RA page 56) Geneva King had a future hearing of her denial of Medicaid benefits scheduled for February 12, 2010. (RA page 62 #15 FFKC). Jon Klein, the attorney employed by the Cabinet testified at the hearing that "the Medicaid denial is not considered 'final' until the appeal process is complete." (RA ***20** page 62 #15FFKC) [7] The Medicaid Hearing Officer has not yet not rendered his decision arising from the hearing as of January 17, 2011.

If River Valley did not wish to be subject to the restriction on their ability to discharge a resident they could have decided to not accept Medicaid. [8] However, since they decided that they wanted to accept the benefits of Medicaid they must now also accept the responsibilities of allowing the Agency's process to be completed. [9] If the Circuit Court and Cabinet's decision is allowed to stand, then an initial caseworker's denial of a Medicaid application will be the trigger as to whether a person should be discharged from a nursing home. Caseworkers regularly make mistakes. Their caseloads are overwhelming. For the reasons given a Nursing Home resident who has filed a Medicaid application has the right to expect that their application will be given administrative appellate review [10] prior to a nursing facility having the right to issue a discharge notice for non-payment under 900 KAR 2:050§2(1)(e) and 42 CFR § 483.12(a)(2)(v).

***21 ARGUMENT #3**

THE FRANKLIN CIRCUIT COURT AND THE CABINET BOTH ALLOW BUTLER REST HOME, INC. TO NAME THE LOCATION OF DISCHARGE IN THE NOTICE OF DISCHARGE WTIHOUT PROVIDING PROPER PREPARATION AND ORIENTATION IN VIOLATION OF 900 KAR 2:050 §2(6) AND 42 CFR § 483.12(A)(7).

The above issue was preserved for appeal by the filing a Memorandum on April 9, 2010, see Argument Three (RA pages 139).

900 KAR 2:050 §2 (3)(a) requires that before a facility discharges a resident that the resident be notified in writing. 900 KAR 2:05§2 (5) sets forth the contents of that writing and requires under subsection (c) that the written discharge notice shall include the location to which the resident is to be discharged. On January 4, 2010 the written notice was mailed to the home of the daughter of Geneva King and stated that "Mrs. King will be discharged to 1010 Sycamore Street on February 4th, 2010 to your care." (RA page 46)

900 KAR 2:050§2 (6) and 42 CFR §483.12(a)(7) states that "A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility." For the reasons set forth in Argument Number #2, one must look to the State Operations Manual Appendix PP - Guidance to Surveyors for Long Term Care Facilities to understand what this requirement means. The Manual at F204 §483.12 (a) (7) Orientation for Transfer or Discharge (Appendix 17) states:

> 'Sufficient preparation' means the facility informs the resident where he or she is going and takes steps under its control to assure ***22** safe transportation. The facility should actively involve, to the extent possible, the resident and the resident's family in selecting the new residence. Some examples of orientation may include trial visits, if possible, by the resident to a new location; working with family to ask their assistance in assuring the resident that valued possessions are not left behind or lost; orienting staff in the

> receiving facility to resident's daily patterns; and reviewing with staff routines for handling transfers and discharges in a manner that minimizes unnecessary and avoidable anxiety or depression and recognizes characteristic resident reactions identified by the resident assessment and care plan.

At the hearing Geneva King claimed that River Valley had failed to provide for her safety, because it had not conducted an inspection of the location listed in the written notice to which she was to be discharged. Mr. Urlage, the Administrator, stated that the home visit should not occur too far in advance of the actual discharge, in case the resident's needs changed in the interim. The Cabinet found this testimony persuasive and ruled that as the discharge has not yet occurred, there has been no proof that King's safety or welfare is threatened by the proposed discharge. (RA 65 #8 CLKC) Simply, it is not the law.

The decision of the Cabinet and the affirmation of that decision by the Circuit Court completely ignores the requirements of 900 KAR 2:050 §2 (6), 42 CFR §483.12(a)(7) and the State Operations Manual Appendix PP - Guidance to Surveyors for Long Term Care Facilities. How is it possible that 900 KAR 2:050§2 (5) (c) requires a discharge letter to include the location to which the resident is to be discharged, but not require the Nursing Home to take steps to determine, prior to the letter being sent, whether the location is appropriate? [11] If a nursing home is not required to write in the ***23** discharge letter a location that they actually know is an appropriate protective placement under 900 KAR 2:050 §2 (6), then 900 KAR 2:050 §2 (5) (c) is meaningless.

CONCLUSION

The action of the Franklin Circuit Court when it sustained the Final Order of the Cabinet violated the constitutional and statutory provisional rights of Geneva King; was in excess of statutory authority of the Agency; arbitrary, capricious and characterized by an **abuse** of discretion and deficient as otherwise provided by Federal and State law and should be REVERSED.

The Court of Appeals should rule as follows:
1. No Notice of Discharge shall issue against any Medicaid applicant until after the Agency has issued a Final Order which would occur when an applicant has exhausted his or her administrative appeal process or has abandoned the appeal.

2. No Notice of Discharge shall issue against a nursing home resident for non-payment until the respective Nursing Facility has determined the discharge location after “sufficient preparation and orientation” as set out in 900 KAR 2:050 § 2(6) and 42 CFR §483.12(a)(7) as described by CMS in the State Operations Manual.

3. No Notice of Discharge shall be enforceable without actual delivery of the Notice of Discharge to the actual nursing home resident.

4. For purposes of delivery of Notice of Discharge from a Nursing Home 900 KAR 2:050 Section 1 (3) is in violation of 42 CFR §483.12 in so far as it defines ***24** “resident” to include any other person than the actual resident him/herself.

5. That the decisions of the Franklin Circuit Court of July 19, 2010 and August 3, 2010 and the decision of the Cabinet for Health and Family Services entered on the 3rd day of February, 2010 be reversed and that Butler Rest Home, Inc. d/b/a River Valley Nursing Home be ordered not to discharge Geneva King from their facility.

Footnotes

1 *See,(Appendix 8)* State of Minnesota Office of Administrative Hearings: *In the Matter of the Involuntary Discharge/Transfer of V.M. (Petitioner) by Lakeside Health Care Center of Dassel (Respondent) OHA 8-0900-19416-2* an ALJ case “in point” with this matter

where the Administrative Law Judge stated that even an incompetent individual had to be personally served. Here, Ms. King is not an incompetent.

2 See, State Operations Manual at §483.12(a)(4)(i) published by CMS to the participating states setting out the proper administration of the Medicaid program pursuant to Federal Regulations. (Appendix 9)

3 *See, also Grammer v John J. Kane Regional Centers-Glen Hazel,* 570 F.3rd 520, 523(3d Cir. 2009). "States are, of course, not required to participate in this program, [Medicaid] but those that do accept federal funding must comply with the Medicaid Act and with regulations promulgated by the Secretary of Health and Human Services.

4 900 KAR 2:050 § I (3)

5 The State Operations Manual is available at www.cms.gov

6 *Hamburg Healthcare, LLC v. Leavitt,* Case 5:06-cv-00397-JMH see (Appendix 13).

7 *Bennett v. Spears,* 520 U.S. 154, 177-178 (1997) "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision making process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow"'.

8 *See, Grammer, supra*

9 *Linton, supra.*

10 A "Final Order is defined in the Kentucky Administrative Procedures Act as the "final disposition of the administrative hearing, whenever made effective by an agency head, whether affirmative, negative, injunctive, declaratory, agreed, or imperative in form." KRS 13B.010 (6). (Appendix 15) See, 907 KAR 1:560 Sections 15 and 16. In Medicaid appeals this is when the applicants stops her appeal or the Public Assistance Appeal Board issues its order whichever is first. (Appendix 16)

11 *See,* "Sufficient preparation" above and at CMS Manual §483.12(a)(7).

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